Association of Bay Area Governments
PLANNING FOR SECOND UNITS FORUM

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a choice between housing and parking –
was made by the Legislature in favor of housing."[1]

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March 28, 2003

[1] *Wilson v. City of Laguna Beach* (1992) 6 Cal.App.4th 543, 546.

Introduction

The Legislature restated its twenty-year commitment to second units as a valuable form of housing in California most recently in AB 1866 (Wright).[2] This paper will consider the amendments made to Government Code § 65852.2 by AB 1866 (Wright) by reviewing (1) the legislative history of second units; (2) the courts' interpretation of Section 65852.2; and (3) these most recent amendments to the law. The paper will conclude with a set of issues that have been left unanswered by this legislation.

Legislative History

The Legislature first expressed its interest in second-family residential units in 1982 when it acknowledged the "tremendous unmet need" for new housing in California, declared that "existing housing resources are vastly underutilized," and determined that second-family residential units were a useful tool to provide (1) a cost-effective means of serving development through the use of existing infrastructure; (2) relatively affordable housing; (3) a means for purchasers of new or existing homes to pay their high interest home loans; and (4) security for homeowners living alone.[3] This first authorization to create second units in single-family and multifamily residential zones allowed for review by conditional use permit if a city or county adopted its own ordinance; required approval, without a conditional use permit, if in compliance with statutory standards, if a city or county failed to adopt its own ordinance; and prohibited adoption of an ordinance which totally precluded second units within single-family and multifamily zoned areas unless the ordinance contained certain findings. "Second unit" was defined as either a detached or attached dwelling unit. The statute was hailed as "one of California's more innovative efforts" to respond to the housing crisis.[4]

The 1986 amendments to Section 65852.2 made certain changes to the standards applicable to a city that did not adopt its own ordinance. The total floor space of a second unit was restricted to 640 square feet; and an increase in floor area could not exceed 15% of the existing living area.[5] The 1990 amendments increased the floor space restriction to 1200 square feet and the increase in floor area to 30% of the existing living area.[6] The 1994 amendments, among other changes, added § 65582.2(e) establishing maximum parking requirements.[7]

Up until the most recent amendments made to Section 65852.2 by AB 1866 (Wright), the law as enacted in 1982 remained essentially as originally enacted: a city, by ordinance, was able to exercise its discretion to approve, disapprove, or approve with conditions, second residential units through a conditional use permit; a city without an ordinance was

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[2] Statutes of 2002, Chapter 1062.
[3] Section 1 of Statutes. 1982, Chapter 1440.
[4] This statement was made in a letter to the Senate Local Government Committee concerning the genesis of the statute, Senate Bill 1534 by economist David Shulman.
[5] Statutes of 1986, Chapter 156.
[6] Statutes of 1990, Chapter 1150.
[7] Statutes of 1994, Chapter 580.

required to approve second residential units found to be in compliance with the statutory standards; and a city was prohibited from totally precluding second units within single-family or multifamily zoned areas unless certain findings could be made.

In a precursor of the state policy expressed in AB 1866 (Wright), the Legislature adopted Government Code § 65852.150 in 1994 reiterating its belief that second units are a valuable form of housing and stating:

> It is the intent of the Legislature that *any second-unit ordinances adopted by local agencies have the effect of providing for the creation of second units* and that provisions in these ordinances relating to matters including unit size, parking, fees and other requirements are not so arbitrary, excessive, or burdensome so as to unreasonably restrict the ability of homeowners to create second units in zones in which they are authorized by local ordinance (emphasis added).

Judicial Interpretation

Understanding the implications of both Government Code § 65852.150 and the two following cases may have allowed one to anticipate the principal change in the law made by AB 1866 (Wright) – prohibiting review by conditional use permit, and requiring the ministerial approval of second residential units.

Jeffrey Harris owned a small 869-square-foot home in Costa Mesa in a residential area designated as low density residential. In 1991, Mr. Harris applied for permission to raze his detached garage, facing on an alley, and erect a two-story building – a three-car garage with carport below and an apartment above. The building was to contain one bedroom, a study, living room dining room and two bathrooms. Although the City's zoning administrator approved the plan because it conformed to all development standards in effect at the time of its approval, neighbors appealed the approval to the Planning Commission. Forty-seven out of fifty-seven homeowners within 300 feet of the residence opposed the project. The City disapproved the use permit based upon findings relating to inconsistency with the neighborhood; the tendency to create invasions of privacy; and the size of the structure. The Court upheld the City's disapproval finding that there was substantial evidence in the record to support the findings.[8]

Harold Wilson owned a second unit annexed into the City of Laguna Beach in 1987. Within a month of the annexation, the City began code enforcement proceedings to remove the unit. Mr. Wilson submitted an application for approval under Section 65852.2(b) since the City had not adopted a second unit ordinance pursuant to Section 65852.2(a). Subdivision (b) calls for approval of a second residential unit if it complies with the statutory standards set forth in that subdivision. The City's refusal to approve the application was overturned by the Court with the following disdainful comments:

[8] *Harris v. City of Costa Mesa* (1994) 25 Cal.App.4th 963.

- It is not surprising that cities where finding a parking space can be the highlight of one's day were less than enthusiastic about implementing the granny flat statute. However, "the fundamental value judgment at stake here – a choice between housing and parking – was made by the Legislature in favor of housing. *It* decided the benefits of the additional housing outweigh the costs of exacerbating local parking problems."[9]

- The city's actions "follow a direct path to an overwhelming conclusion: the city was going to use every trick in the book to avoid complying with an unwanted state law. Such actions do not exactly inspire confidence in local government. The city appears to have chosen to ignore that state legislatures prevail over municipalities in the pecking order of governments."[10]

- "We hope this case does not represent a trend on the part of local agencies to circumvent both the spirit and letter of state law. California municipalities are not fiefdoms unto their own. The governing bodies of cities are charged with the responsibility of faithfully executing the laws of the United States and State of California."[11]

The combination of Government Code § 65852.150 and these two cases send the following message: A local ordinance adopted pursuant to this section must not only establish a procedure for evaluating second residential units, but must also create second residential units. If either a local ordinance's conditional use permit process or other requirement puts roadblocks in front of the creation of these units, the local ordinance does not implement what seems to be the intent of the Legislature in enacting these statutes.

Changes made by AB 1866 (Wright)

AB 1866 (Wright) amended the law in three ways:

- On and after July 1, 2003, an application received pursuant to a local ordinance adopted pursuant to Government Code § 65852.2(a) must be *considered ministerially* without discretionary review or hearing.[12] The section in the law that allowed a city to require a conditional use permit was deleted.

- Effective January 1, 2003, an application received by a city that has not adopted its own ordinance, must be *approved or disapproved ministerially* without discretionary review.

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[9] *Wilson v. City of Laguna Beach* (1992) 6 Cal.App.4th 543, 546.
[10] *Id*. at pp. 557- 558.
[11] *Id.* at pp. 560- 561.
[12] Until amended on August 22, 2002, AB 1866 provided that "The ordinance shall require ministerial approval without discretionary review of applications for second units that meet the requirements of the ordinance." There is no explanation for the change from that language to "the application shall be considered ministerially without discretionary review…." The difference between the language is not readily apparent although the change would seem to signify some difference in meaning.

- The section does not supersede or any way alter the effect or application of the California Coastal Act, except that local government is not required to hold public hearings for coastal development permit applications.

The following principles inform the discussion of the meaning and effect of these amendments:

- A conditional use permit is administrative permission for uses not allowed as a matter of right in a zone, but subject to approval. The issuance of a conditional use permit may be subject to conditions in order to ensure that the use promotes the public health, safety, and welfare; or it may be disapproved if the use does not promote the public health, safety, and welfare.[13]

- The objective of statutory interpretation is to ascertain the legislative intent. Statutory interpretation is guided by the "plain-meaning" rule. Words used in a statute should be given the meaning they bear in ordinary use. If the language is clear and unambiguous there is no need for construction by the courts.[14]

- The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. Each sentence must be read in the light of the statutory scheme.[15]

The elimination of authority to require a conditional use permit and the requirement to consider an application for a second unit ministerially without discretionary review are the two most significant changes to the law. The elimination of use permit review has re-focused attention on a city's authority to designate areas for second units based upon certain criteria and to impose standards on second units that include parking, height, setback, lot coverage, etc.[16]

What is "ministerial review?"

New Section 65852.2(a)(3) provides that –

> When a local agency receives its first application on or after July 1, 2003, for a permit pursuant to this subdivision, the application shall be considered ministerially without discretionary review or hearing….

A ministerial act is an act that an employee is required to perform in a prescribed manner in accordance with a legal mandate. The employee must perform a ministerial act to his judgment or opinion concerning such act's propriety or impropriety, when a given state of

[13] Cal.Zoning Practice (Cont.Ed.Bar 1996) Types of Zoning Relief, section 7.64, p. 299.
[14] *Souhein v. City of San Dimas* (1996) 47 Cal.App.4th 1181, 1188.
[15] *Id.*
[16] Government Code § 65852.2(a)(1)(A) and (B).

facts exists. A ministerial act is performed without the exercise of discretion. Discretion requires the exercise of judgment and careful balancing of conflicting interests.[17] (For example, whether to approve a conditional use permit for a second residential unit requires the decision-maker to carefully balance the interests of the applicant and the interests of the neighborhood opposition.) When a statute requires a prescribed act upon a prescribed contingency, the function is ministerial. When a statute or ordinance clearly defines specific duties or a course of conduct, that course of conduct becomes mandatory and eliminates any element of discretion.[18]

Ministerial review required by section 65852.2(a)(3) means that the person who reviews the application for a second residential unit must measure the project against the standards, criteria, and density limitations of the ordinance; and against the provisions of Sections 65852.2(d) and (e).

What are the standards, criteria, and density limitations against which a project is reviewed?

An ordinance may designate areas where second units may be permitted based on criteria that may include adequacy of water and sewer services and the impact of second units on traffic flow or other factors chosen by the jurisdiction adopting the ordinance. An ordinance may also impose standards on second units that include parking, height, setback, lot coverage, architectural review, maximum size and standards that prevent adverse impacts on real property listed on the California Register of Historic Places.[19] These standards and criteria are statements of legislative policy adopted by a city council when the ordinance is approved. The city council delegates authority to review applications for second units to the zoning administrator, or the Planning Director, or other official who considers the application "ministerially without discretionary review." The city council must adopt clear standards and criteria in order to allow the decision-making official to consider the application ministerially. For example, if the application will be subject to architectural review, the ordinance must include criteria to allow consideration of the application without the exercise of discretion. Such criteria might include design standards (e.g. no eaves overhanging the property line; paint color identical to or within the same hue category as the existing dwelling unit on the property; same architectural style as the existing dwelling if the style is identifiable). The city council's delegation of authority is unconstitutional if it fails to provide adequate direction for the implementation of the policy adopted by the ordinance.[20]

Perhaps the change made by the bill in the way second units are reviewed, is most clearly represented by the elimination of the authority to require a conditional use permit and the retention of the authority to preclude second units within single-family or multifamily areas if the ordinance acknowledges that it may limit housing opportunities of the region

[17] *Horn v. Ventura* (1979) 24 Cal.3d 605, 615.
[18] *Id.* at pp. 504 – 505.
[19] Certain standards, such as parking and maximum size, are dictated in part by subdivisions (d) and (e).
[20] *Rodriquez v. Solis,* supra, at p. 507; *Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal.3d 184, 190.

and it finds that "specific adverse impacts on the public health, safety and welfare" would result from allowing second units within single-family or multi-family zoned areas.[21] Review of a use permit allows for exercise of judgment and careful balancing of conflicting interests. Findings of "specific adverse impacts on the public health, safety and welfare" require identification of the impacts and substantial evidence to support them.

Remaining Issues

Although some of the changes made by the bill are clear, others are not. For example:

- Section 65852.2(a)(3) requires the application "to be *considered* ministerially without discretionary review…." Section 65852.2(b) directs the agency to "*approve or disapprove* the application ministerially without discretionary review." Is there a difference between "considering" the application and "approving or disapproving the application?

- Although the subdivision (a) and (b) alternatives were significantly different before AB 1866 (Wright) – (a) allowed for a use permit, and (b) did not – adopting an ordinance pursuant to (a) or reviewing an application pursuant to (b) (without the adoption of a local ordinance), may not be significantly different any longer. The only difference between the two alternatives is that subdivision (a) allows a city to designate areas within which second units are permitted and subdivision (b) does not. Each city should analyze the appropriate path to regulation for that city.

- Section 65852.1 allows a city to issue a zoning variance or conditional use permit for a dwelling unit to be constructed, or which is attached to or detached from, a primary residence if the dwelling unit is intended for the sole occupancy of one adult or two adult persons who are 62 years of age or over; the floor space of the attached dwelling unit does not exceed 30 percent of the existing living area; or the area of the unit does not exceed 1,200 feet. Section 65852.1 concludes by stating: "This section shall not be construed to limit the requirements of Section 65852.2 or the power of local governments to permit second units." This section, which allows a use permit for second units under certain circumstances, was not amended when AB 1866 (Wright) was enacted. The relationship between these two sections is unclear. The plain meaning of the language seems to allow a use permit under certain circumstances. However this language seems to conflict with Section 65852.2.

- The design of a new subdivision may include second units. Does Section 65852.2 apply to the review of these units?

[21] Gov't Code § 65852.2(c).

Coming Attractions

Before AB 1866 (Wright) has had a chance to go into effect, AB 1160 (Steinberg) has been introduced to further amend Section 65852.2.[22] The bill (1) removes the limitation on the increase in floor area of an attached second unit in subdivision (b)(1)(E); and (2) removes the limitation on the maximum size of an unit (1,200 square feet). In addition, the bill removes a city's authority to require an applicant for a permit to be an owner-occupant. The legislative history of Section 65852.2 indicates that the purpose of the owner-occupancy requirement was to protect neighborhood stability and the character of existing family neighborhoods and to discourage speculation and absentee ownership.[23] The "evident intent" of the Legislature was to increase the supply of affordable housing without dramatically changing the character and stability of existing family neighborhoods. As one court noted, "the statute is a careful balancing of two competing interests."[24] AB 1160 (Steinberg) seems to upset this balance.

Conclusion

For the last twenty years the State of California has supported second residential units as an important ingredient in the State's affordable housing supply. Although the law began by a fairly simple grant of authority to provide for second residential units in residential zones that might not otherwise allow for the density, the law has become a directive to approve second residential units if they comport with the standards and criteria adopted by local ordinance. The spirit of the law is clear. The letter of the law is slightly less clear. Local governments must strive to uphold both the spirit and the letter of the law.

[22] AB 1160 (Steinberg) is scheduled for hearing by the Assembly Housing Committee on April 9, 2003.
[23] Cal. Dept. of Housing and Community Development, Sen.Bill No. 1534 Fact Sheet (Mar. 1982).
[24] *Sounheim v. City of San Dimas* (1996) 47 Cal.App.4th 1181.